United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7649

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FOR THE SECOND CIRCUIT

MARVIN STERN,

Plaintiff-Appellee and Cross-Appellant,

B

against

P/S

SATRA CORPORATION and SATRA CONSULTANT CORPORATION,

Defendants-Appellants and Cross-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF APPELLEE AND CROSS-APPELLANT MARVIN STERN

STROOCK & STROOCK & LAVAN
Attorneys for Marvin Stern
61 Broadway
New York, New York 10006
(212) 425-5200

Of Counsel:

ALVIN K. HELLERSTEIN
VIVIENNE W. NEARING

TABLE OF CONTENTS

I. TABLE OF CASES

II. AUTHORITIES

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Preliminary Statement

This case comes before this Court on an appeal by Satra (defendants Satra Corporation and Satra Consultant Corporation) and a cross-appeal by Dr. Marvin Stern (plaintiff) from a final judgment entered by Hon. Morris E. Lasker, United States District Judge, in favor of Dr. Stern on October 20, 1975, after a trial on the issue of liability before a jury and a trial on the issue of damages before the District Court.

Questions Presented

As to Satra's Appeal

I. Was it error for the District Court to refuse to include Satra's request for a charge that innocent misrepresentation was a basis for rescission and, if so, was the error harmless and without substantial prejudice to Satra's rights?

II. Was the determination of the District Court as to the application of the expense schedule clearly erroneous?

III. Was the determination by the District Court that the 1973 agreement between Satra and IBM constituted a replacement and renewal contract of their 1971 agreement clearly erroneous?

As to Stern's Cross-Appeal

IV. Did the District Court err in refusing to find that moneys paid to Satra by IBM as "retainers" and "advances against commissions" in the 1973 agreement be treated other than as Satra agreed to do under the 1971 agreement *i.e.*, without deduction pursuant to the expense schedule?

V. Did the District Court err in determining, without any supporting evidence, that mitigation of damages was applicable, and in setting a percentage figure thereon?

Statement of the Case

A. *Nature of the Case*

In January 1972 Stern brought an action against Satra for a declaratory judgment that certain documents exchanged between him and Satra constituted a binding contract, and for the effectuation of his rights thereunder.

("Amended Complaint", 6-13A).* Satra defended on the grounds (a) that the documents exchanged did not constitute a valid and binding agreement because of failure of consideration from Dr. Stern and (b) that Satra, having entered into the agreement in reliance on false and fraudulent statements of material fact made by Stern, was entitled to rescission. ("Answer", 14-25A).

The jury found (935A), after evaluating the evidence and passing on the credibility of the witnesses (911-912A), in favor of Dr. Stern, *i.e.*

1. There was a valid and binding contract between Stern and Satra (904A); and

2. Satra had not been induced to enter into the agreement in reliance on material misrepresentations knowingly made by Stern (904-908A); and

3. Stern rendered to Satra the consideration required under the contract (908A).

This verdict for Stern on the issue of liability reserved the issue of damages for determination by the District Court. The final judgment was entered on October 20, 1975 ("Judgment" 61-83A). Satra filed its notice of appeal on November 17, 1975 seeking a reversal of the jury's determination of liability because of an alleged error in the Dis-

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* Stern originally included IBM World Trade Corporation and one of its executives as parties defendant on an "inducement to breach" count, but later stipulated to dismiss these parties. Early discovery had indicated that this IBM executive, Ralph Stafford, had not acted as an agent for IBM but only for himself in those dealings with Satra which Stern alleged to constitute an "inducement to breach" and that Stafford had later left IBM for employment by Satra. Satra's statement at p. 3 of its Brief, that Stern stipulated to dismiss its aforesaid claims on the "eve of trial" because he was "[o]bviously unable to prove these claims" is irrelevant to the issues of Satra's liability and the damages it should pay and without merit.

trict Court's instructions or, failing that, a remand on the determination of damages. Stern filed notice of his cross-appeal on November 25, 1975, seeking only modification of the District Court's determination of damages.

B. Factual Background

(1) *The Parties*

(a) *Dr. Stern*

Dr. Stern is an engineer, mathematician, management consultant and corporate executive. Born, raised and schooled in New York, he secured a B.S. in engineering and an M.S. and Ph.D in mathematics (107A). After receiving his doctorate in 1954, he spent the next 6 years working his way up the General Dynamics hierarchy into its corporate offices (107A). In 1960 he joined the government as Deputy Director for defense, reasearch and engineering in the Office of Secretary of Defense, Robert McNamara (108A), where he analyzed and assessed weapons systems, strategic techniques and technical capacities. At that time he became familiar with many high-ranking government officials in the Departments of Defense, Commerce and State, with Congressmen, and others (112A, 260A). Thereafter, Stern worked in a senior executive capacity for a number of large corporations, *e.g.,* Vice President of Research and Engineering, North American Aviation; Director, General Precision Corp. and president of one of its divisions; Vice-President, Rand Corporation (108A); and he was offered, during the time he negotiated the agreement which is the subject of this action, the presidency of the Kollsman Instrument Company (255-256A). During these years Stern knew and worked with top level executives in a great number of major American companies (115-116A).

(b) *Satra*

Satra is a corporation which was founded in the mid 1960's by Ara Oztemel. Satra, an acronym derived from "Soviet-American trade", is a trading company which imported chrome and other steel additives found principally in the Soviet Union in exchange for industrial and consumer products (673-675A). Because of its knowledge of the U.S.S.R., Satra in about 1968 (676A, 537A) expanded its operations so as to service other corporations interested in entering the Soviet market. This service consisted of "holding their [corporate] hands and taking them to the Soviet Union and making sure that they didn't get lost or arrested or anything like that", "a glorified travel agent", a "babysitting operation" (testimony of Oztemel, 676A-677A). Satra assisted also in negotiating with the Russians and facilitating commercial arrangements involving financing and switch-and-barter operations made necessary because the Soviets often preferred to make payment in commodities and non-convertible currencies that had to be "switched" to Western currencies (677A, 113-114A).

(2) *The Stern-Satra Relationship*

(a) *Introduction*

In December of 1970, while Stern was living in Los Angeles and working in New York and elsewhere as a management consultant (255A), he met an old social acquaintance and neighbor, Dr. Paul Proehl, a U.C.L.A. professor of international law then with Satra during a one-year sabbatical (263-265A, 269A). Proehl mentioned that the Soviets were then interested in extracting copper from the Baikel region and that Satra was searching for a U.S. company to explore and mine for this copper (265A, 538-539A). Stern volunteered to, and did, put Satra in touch with the president and other executives of Cerro Copper, refusing to take any payment therefor (271-273A, 541A).

(b) *Kama River Project*

Subsequently Proehl confided to Stern that Satra was interested in getting involved in the Soviets' Kama River project to build the largest truck manufacturing plant in the world. Satra hoped to secure Mack Truck as a client to participate in this project, and thereby needed both sophisticated guidance in following the relaxation of U.S. policy regarding commerce with the U.S.S.R. and an evaluation of Satra's then Washington representative (264A, 270-271A). Stern helped by making a few introductions and investigatory phone calls for which he wanted no fee or commission. Proehl required Stern's further guidance and evaluation on a professional basis (272-273A) and arranged for Stern to meet that March with Satra executives in New York (273-274A). Stern thereafter made further Washington inquiries the results of which he reported, on April 9, 1971, to Ara Oztemel, the president, and James Giffen, the vice president of Satra (278-283A).

Oztemel wanted to engage Stern as a consultant to evaluate changing government policies regarding U.S. participation in projects such as the Kama River plant (283-284A). Stern agreed so to act for a fee of $500 a day plus expenses (287-288A, 687A), which arrangement was orally confirmed (290-292A, 299-301A, 546A). Stern, who worked on this project from the end of April until the middle of July (292A, 625A), kept work-day and expense records (300A). After the first few weeks, Stern requested $5,000 for two weeks work (301-302A, 684-685A). Giffen, who thought Stern was performing a valuable service for Satra (624A), and who attended Washington meetings with Senators and others arranged by Stern (626A), asked Stern to continue at the $500 per diem rate for a total of $10,000 for the month (303A). At the month's end Giffen told Stern that Satra wanted to extend this arrangement for another full month (404A). By mid-July Stern, not yet

having been paid, requested $20,000 for his two months work (304-306A). Oztemel, in what was to become a pattern, offered half, $10,000, with an additional $15,000 if the licenses came through (306-307, 548-549, 685-687A), and Stern, unwilling to seek vindication on oral conversations alone (306-307A), acquiesced. That August, Oztemel paid Stern the $10,000 (303-304, 387A). He did not pay more even after export licenses worth $600 million materialized* (549-550A, 629-630A, 687A, 801-802A, 812-814A, 839-841A).

(c) *Expanding Relationship*

All during this time, the government's new policy of detente was expected to open the way not only for the Kama River project, but for overall expansion of trade with Russia. Thus, while Stern was contacting government officials concerning enlarged trade opportunities, he was also discussing Soviet technological needs with Russian officials (110-112A) and introducing Satra to other potential corporate clients interested in the Soviet market including, in addition to Cerro, such large corporations as Gould Industries, Boeing, Stromberg-Carlson, General Dynamics and, eventually, IBM (115-116, 610A). Satra was interested in a relationship with Stern because, as Oztemel explained:

> "[H]e filled in a vacuum in our company which had to do with highly sophisticated technology . . . [W]e didn't have anybody in the company with his level in that field and once we had somebody like that in our company it naturally opened the door to people with that kind of orientation" (792A).

* * *

* Oztemel testified that almost $600 million in Kama River project licenses were eventually approved in November, 1972, including licenses to Satra clients (801-802A, *and see* Giffen 630A), one of which was for over $16 million worth of exports (804-805A) and others for lesser amounts (838-839A). Notwithstanding, nothing more was paid to Stern.

"[W]ith my knowledge of eastern markets and trade and with his ability and knowledge of sophisticated technology and his reputation and knowledge of highly technology-oriented United States companies . . . we should be able to form a good partnership. This is the conclusion we came to. We both thought it was a good idea" (691A; and see 792-793A, 859-861A).

It became clear to Stern that in self-protection he had to make precise financial arrangements with Satra (499A).

On August 10, 1971, the evening after IBM and Satra's first meeting, presently to be discussed, Stern dined with Oztemel and Oztemel's "girl Friday", Bette Van Stavern, to discuss a working arrangement. Stern was introducing Satra to technology oriented firms that could generate substantial business and Stern wished to define his relationship: a joint venture with Satra, employment with Satra, or a combination of joint venturer and employee. Oztemel, wishing to avoid direct expense because uncertain that anything practical would result, offered contingencies; Stern stated a preference for current on-going income (120-122A, 464-465A, 498A, 618A, 691-693A). Compromises were discussed, and at dinner's end Oztemel suggested that Stern write an agreement embodying their conclusions (122-125A, 691A, 858A).

(d) *Evolution of Agreement*

Stern's draft agreement of August 10th provided that Stern and Satra would exercise their best joint efforts to represent certain companies, thereafter to be named, in the Soviet Union, all benefits derived therefrom to be shared equally. Stern proposed that his expenses and a monthly fee (*i.e.* a salary to be agreed upon) were to be paid by

Satra as advances* against the expected profits (Exhibit A, E-2).

Oztemel acknowledged that this draft properly represented their discussion but, using his executive committee as an excuse,** refused to agree and made a new proposal (129-130A, 334-335A, 468A).

Oztemel accepted the partnership concept, but told Stern that Satra should have more than 50%. He suggested as an alternative, *either* (a) a $7,500 a month ($90,000 a year) advance payment to Stern to cover salary and expenses and a 75/25 revenue sharing provision as to two specified companies, IBM and Stromberg-Carlson (with an open percentage for other companies) *or* (b) a straight 50/50 arrangement with no obligation on the part of Satra to pay any fixed sums to Stern (133-135A, 336A, 699A). Hanno Mott, Satra's lawyer, reduced this arrangement to writing in a draft dated August 25, 1971 and Stern took this offer back to California in the hope of securing independent financing so as to take the 50/50 deal (137-139A, 337A; Exhibit B, E4-5).

From California, Stern telephoned Oztemel on Saturday, August 28th, and advised that since he had been unable to arrange for independent financing, he accepted the offer of $7,500 per month plus a percentage. He asked that his percentage of revenues be upped from 25% to 30% (140A, 761-762A). Oztemel rejected the requested modification and Stern, commenting that Oztemel drove a hard bargain, accepted (140-141A). Oztemel agreed and expressed the hope that Satra and Stern would make a lot of money together (141A).

* Satra's characterization of this agreement as an arrangement for a monthly fee (Satra's Brief at 7) is clearly erroneous. The fee was to be an *advance* against an *equal share in benefits*.

** As Satra's attorney, Hanno Mott explained, the executive committee always acted by unanimous consent and where Oztemel had strong opinions "as to any matter that had been thoroughly discussed he let us know that and we generally saw the light" (444A).

On Stern's return to New York, on Monday or Tuesday August 30 or 31st, Hanno Mott (Satra's attorney) and William Hermann (Satra's accountant) proposed new modifications. Stating that they represented the executive committee, they insisted that Satra should be reimbursed for expenses prior to the 75/25 split (142-143A, 345A). When Stern commented that this proposal would require him to audit the Satra books, they refused and proposed, instead, an arbitrary schedule of reimbursement as a *function of revenues*, rather than actual reimbursement (144A, 345A). Stern testified as to the extended discussion as follows:

> "A. In other words, they wanted to agree before hand on a schedule. In fact, they showed two columns in the numbers, expenses and revenues. The idea they offered was, rather than be reimbursed for actual expenses, why don't we agree beforehand that for these revenues that are coming in, [there'll] be a reimbursement of this much expense; instead of after the fact, looking at the actual expenses from an audit.
>
> "In other words, they said it would work the following way: If there—if there are no revenues coming in, there is no expense reimbursement. As the revenues begin to come in, we would share, according to the agreement, but my share would be reduced somewhat and theirs would go up somewhat, by virtue of them having to be reimbursed for expenses according to this schedule vis-a-vis revenues.
>
> * * *
>
> "A. [Drawing a graph on the blackboard for the jury to see (reproduced as Exhibit EEEE, E-91), Stern continued,] If we were to plot here a total annual revenues, that is, the money that would come in to us from clients. And we would plot there, total annual expenses to be reimbursed, these are in thousands of dollars. This number is 250, five hundred,

750, one million, and I'll put two million here. All right.

"And across here, I am now going to plot again, 100,000, 200,000. The points on the columns were these, namely, the representation was this. Now the reason it was annual—let me [d]o it in a counterway. If it were not annual, then after awhile there's no additional expense reimbursement. But at the beginnings, there are higher expense reimbursements. So they wanted the schedule to be reapplied annually.

"Q. So each year, in other words, this would be done anew?

"A. That's right.

"Q. There would be no carryover from prior years?

"A. No. No.

"The way again, we start out—and the entire reason for this was in lieu of actual expenses, which would have negated auditing the books. They gave me two columns of numbers which was an expense reimbursement schedule annually, where the expenses to be reimbursed annually were a function of the revenues annually. No revenues. They don't get reimbursed. Any expenses, as we begin to get revenues—we begin the sharing, they get reimbursed additionally. In other words, they take away from me and go to them, according to prearranged schedule, as I have indicated.

"Q. Dr. Stern, let me just see if we understand this. Let's suppose in one year there is no income and in the second year there is $250,000 of income. This annual schedule expense shows $100,000.

"Is there to be deducted $100,000 or $200,000?

"A. Annually, we start anew. . . . Each year you start new, in order that you start on the steeper gradient of the curve, which was [to their] advantage.

"Q. Supposing there is not $250,000 of income, but something less, say $50,000 of income?

"A. The easiest way, if you look at the ratios here, there are 250 to 100, or 25 to 10.

"Q. What percentage is that?

"A. 40 percent. In other words, during this initial—here, let me put it the following way: Zero revenues, zero expense to be reimbursed. When there is $25,000 revenue, there is $10,000 to be reimbursed. When there are $50,000 revenues, there are $20,000 reimbursed, until you get up to $250,000 revenues and $100,000 to be reimbursed. From then on the slope of the line wasn't as high.

"Q. Meaning the percentage is less?

"A. That's right. And it gets less and less. That is why they wanted to be reinitiated anew every year" (144-148A).

Stern told Mott and Hermann that the mathematical term "incremental" described precisely what they had proposed, and added that term to the headings "annual revenue" and "annual expenses" on the schedule they had been discussing (149A, 503-504A).

Stern was upset by these new negotiations of his oral agreement with Oztemel. The meeting with Mott and Hermann broke up, to be resumed half-an-hour later by a new offer: Satra no longer wanted to pay the $7,500 a month (149-150A). Oztemel, asked in his cross-examination about these constant renegotiations, commented that they were "a lot of fun"* (693A). The discussions, which were suspended while Stern and Oztemel attended another meeting with IBM looking to a possible contract between Satra and IBM, continued later in the day. Stern complained that Oztemel had not only changed the August 10th concept they had agreed upon, but had now reneged on the

* As Oztemel said: [T]here was always something that [Stern] wanted to put in writing. So I mean one more just didn't make any difference. It didn't concern me" (750A).

August 25th agreement as well—always blaming the executive committee which he completely controlled (153A, 444A).

(e) *The Stern-Satra Agreement*

Stern finally told Oztemel that he wanted no further negotiations: Oztemel was to put any offer in a *signed writing* which would memorialize and finalize the terms (153-154A, 499A, 750-751A). Oztemel then directed Mott to write a *new* proposal, and again "cash" today was reduced in favor of a contingent payment ("jam") tomorrow* instead of (a) a 50/50 deal *or* (b) one year at $7,500 against a 75/25 return, the deal was to be 6 months at $6,250 against a 70/30 return. Mott wrote the option, dated August 31, 1971, with the arrangement to be applied to IBM and Stromberg-Carlson, the companies then being actively pursued by Stern (465A, 501A). Oztemel, still interested in reducing his exposure for direct expenses, suggested to Stern: "I hope you take the 50/50 partnership with *no financing* by Satra" (157A). Stern expressed reluctance, noting that the absence of a provision for salary or other current on-going income pending the receipt of his 50% contingent percentage would be difficult for him to accept. Oztemel and Stern then agreed that the expense schedule should be confined to future commission income, and that current on-going income like retainers** should not be subject to deduction before being divided, 50/50 (1052-53A). Oztemel then added this addendum to the offer and signed it (156-159A; Exhibit C, E7-9).

* As Alice found, Through the Looking Glass, "The rule is, jam tomorrow and jam yesterday—but never jam today." And "jam today" never comes, the Red Queen explained, because "It's jam every other day: today isn't any other day, you know."

** Satra's practice was to seek retainer compensation, paid monthly, quarterly or in other periodic fashion, running to $300,000 per year and, in addition, commission compensation contingent on sales. (See Oztemel 855A; and Giffen E-61-63.)

The following day Stern accepted Proposal I, *i.e.* no salary but the straight 50/50 division. The expense schedule was to be applied to future commissions and not to retainers (167-170A; Exhibit D, E-11). Oztemel expressed his relief that Stern had accepted the 50/50 deal ("jam" tomorrow) since it completely released him from financing Stern (170A).

(3) *The IBM Agreement*

(a) *Initial Discussions*

All during the time Stern and Satra were negotiating their contract, Stern without payment, had been endeavoring to secure new clients (especially IBM and Stromberg-Carlson) for Satra, in good faith expectation of working out his own agreement.

As early as June of 1971 Stern had discussed with Llewellyn Thompson, former U.S. Ambassador to the Soviet Union and then consultant to IBM's Chairman of the Board, the possibility of IBM going into the Russian market. At that time there were serious questions about such move. Not only had the U.S. not generally opened up trade with Russia, not only were computers specifically sensitive exports, but IBM had historically refused to deal with the U.S.S.R. Further, as Oztemel frequently pointed out to Stern, it did not seem likely that an internationally based corporation like IBM would need Satra for assistance.

The Ambassador thought, however, that times were changing. A large British computer firm was already dealing with the Soviets; IBM management had changed; and the compulsion of time might impel IBM to seek assistance to enter the Russian market. Thompson suggested that he would relate his discussions with Stern to Gilbert

* 695-696A. "IBM would not under any circumstances consider going into the Soviet Union." *See also* Mott testimony, 443A, "[I]t would be difficult if not impossible for IBM to become a client of Satra."

Jones, Chairman of IBM World Trade Corporation, after which Stern could call Jones directly (171-174A).

Stern relayed this information to various people at Satra, including Oztemel, Giffen, Schloss and Van Stavern, and sought more background information on IBM (175-178A). In mid-July, Stern called Gilbert Jones, who advised that IBM had already contacted Gvishiani, a high Soviet official,* and would contact Stern after receiving his reply. When Stern related his conversation to Satra, Oztemel laughed and recalled that he and Giffen had only five months earlier been rejected by IBM officials both as to doing business with Russia and use of an intermediary (175-176A, 182A, 443A, 553-556A, 688A, 695-696A).

(b) *Beginning the Negotiations*

Early in August, Ralph Stafford, director of IBM's Eastern European operations, telephoned Stern at the request of Mr. Jones to advise that IBM was interested in dealing with the Soviet Union, possibly through an intermediary, and suggested a meeting (183-185A, 652-653A). Stern arranged for Stafford to meet with him and Oztemel at Satra's office on August 10th (185-186A, 654-655A). Stafford discussed the complexities of initiating Russian trade and the help Satra could provide, commented that Stern made an excellent impression in the fields of communication-network and systems-management techniques (662A), but advised that he also intended to interview an Italian firm competitive with Satra (186-188A, 793-794A).

It was that evening, prior to Oztemel's departure for Moscow, that discussions about Stern and Satra's relationship concerning IBM and other companies were first commenced, leading to Stern's August 10, 1971 draft, Exhibit A.

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* Deputy Chairman of the Soviet State Committee for Science and Technology, and Kosygin's son-in-law.

Shortly thereafter Oztemel, in Moscow, notified Stern it was urgent that another meeting with IBM be arranged, even before Stafford's return (192A). Stern thereupon called Stafford's New York office and was connected with Bert Witham, IBM's vice president of finance, who scheduled a meeting for August 24, 1971. Witham, unable to attend that meeting with Stern and Oztemel, was represented by IBM house counsel, Farr (191-193A). Disappointed in not having met Witham, Oztemel expressed pessimism about Satra's chances of contracting with IBM but agreed to Stern's suggestion that Satra continue its efforts (194-195A, 198-199A). That evening, Satra made its August 25th offer, Exhibit B (E-4), to Stern, which Stern thereafter accepted by telephone.

Stern arranged another meeting at IBM for August 31st at which he and Oztemel met with Klaus Hendricks, Stafford's counterpart in the U.S., and Witham (199-201A). Witham declined Satra's offer to help IBM with its exhibit at the Leningrad fair that October, and put off Oztemel's offer to arrange an introduction with Alkhimov* (201-202A).

Oztemel again expressed his pessimism about Satra's chances (203-204A). Stern, however, insisted that the mere fact that IBM had continued the meetings indicated its interest, and that no matter how small the possibility, it was worth the effort since the profit potential was so high (202-205A).

Later that evening, Satra finally made its first signed offer, Exhibit C (E-7), to Stern. It seems clear that as Oztemel viewed the prospects of immediate income from IBM getting dimmer his actual dollar offers to Stern went down—thus he was willing to gamble 50% of a contingent future but withdrew the offer of $90,000 (at $7,500 per

* Soviet Vice-Minister of Foreign Trade.

month) a year in salary and substituted a half-year stint at $37,500. Stern then opted for the 50/50 arrangement.

(c) *Moving Toward Agreement*

On Stafford's return from Europe, Stern scheduled a meeting on September 3, 1971 at Satra's office for Stafford and Hendricks of IBM to meet with Oztemel, Giffen and Stern of Satra. IBM finally indicated real interest by discussing specific details of Satra's assistance if IBM decided to enter the market and engage an intermediary. Hendricks discussed administrative and travel-agency type services (hotels, visas, etc.); Stafford and Stern discussed professional services such as financing arrangements when the Soviets had no western currency, high-level introductions, analysis of Soviet needs for certain kinds of equipment and their technological capacity to deal with same (212-214A, 655-656A).

There followed a series of meetings and telephone calls between Stern and Stafford, high-lighted by a luncheon on September 8, 1971 where specific financial arrangements were discussed (214-215A). Stern suggested that IBM agree to a retainer arrangement, but when Stafford stated that IBM was used to working on a commission basis Stern suggested a nominal retainer to be treated as an advance against commissions (218A). As to commissions, they agreed on 4% of net sales (219A).*

When Stern reported this to Oztemel and Giffen (219A), Oztemel was overjoyed at the magnitude of the 4% commission—having aimed for the 2% commission it had sought from Mack Truck as the prime-contractor for the Kama River project (221-222A). Giffen remarked that the advances against commissions IBM had agreed to pay

* This was later explained as a weighted average based on IBM's sales experience: 3½% of sales of data processing equipment, 7% on sales of office equipment (230-231A).

would be offset by the expense schedule and not treated as retainers. Stern protested, claiming that advances were akin to retainers, and took the issue to Max Schloss, Satra's treasurer. In the presence of Schloss, Giffen and Mott, the issue was resolved in Stern's favor, with the instruction that Stern "go out and get the agreement" and he would "get [his] half without any deductions" (222-223A).

(d) *The 1971 IBM Agreement*

Things moved rapidly after that. At a meeting in Witham's office with Hendricks and Stafford, Stern and Giffen were presented with a letter of intent (224-227A, Exhibit MM, E 65-66) which specified a 3.5% commission (228-229A) on data processing equipment and a 7% commission on office equipment. The agreement was to be terminable if Oztemel ceased being actively engaged in Satra's operations (229-231A).

After this Giffen flew to Europe to join Oztemel, and Stern worked with IBM to put the contract into final form (231-234A; Exhibit H, E16-24). Dated September 22, 1971, it was for a 5 year term, excepting that if net sales did not exceed $50 million by September 22, 1974, IBM could terminate provided it continued to pay commissions on all sales negotiated prior thereto. When Stern brought the contract to Satra one change was requested—Mott and Schloss wanted the agreement made with the Satra subsidiary, but were amenable to having it guaranteed by the parent. This was agreeable to IBM and the final agreements were executed (238-243A; Exhibits I, J and K, E 25-38).

(4) *Satra's Breach of its Agreement with Stern*

No sooner had Stern signed his agreement with Satra and plunged into the quickening pace of the IBM discussions, when Oztemel's pattern of renegotiation commenced anew.

On September 3rd, IBM first indicated its interest to contract wtih Satra. The same evening (two days after the Stern-Satra agreement was made), Hanno Mott presented Stern (393A, 447A) with a new draft for a more formal agreement proposing that a *minimum* of $100,000 be deducted as expenses each year, whether or not revenues accrued, and that expenses be cumulative from year to year (385A, 393A, 447A, 476-478A, 508A; Exhibit Z, E 52-56). Mott maintained that his new proposal, while different from the agreement embodied in the offer and acceptance, Exhibits C and D, was "fair" and sensible (394A, 482-483A, 507A). He further maintained that he could act as impartial attorney for both sides, and had fairly written an agreement for both Satra and Stern (387A, 479A, 480A, 507-508A) as he had done for others on prior occasion.

Stern would have none of this. He complained to Mott about this further attempt to renegotiate an agreement which, for once, had actually been *signed* and by which Stern, for the first time, felt protected* (387-389A, 394-397A, 530.).

Stern rejected Mott's efforts and, in the margin of Mott's draft, wrote with emphasis: "NO! not according to agreement" (393A; E-54).

On September 22nd, IBM signed the agreement with Satra. Stern and Stafford flew to Moscow to meet with Satra personnel and the Russian trade officials (423A). When Stern returned to the U.S., IBM had paid the first of its $25,000 advances and Stern received 50% thereof, in accordance with the agreement (243-244A).

* Oztemel explained that Stern always wanted him to put his agreements in writing, which didn't concern him. Thus, while he put everything in writing, he made sure that none, until the Exhibit C offer, was signed so that none constituted Satra commitments (750-752A).

Shortly thereafter, on November 16, 1971, Oztemel, with Mott along, told Stern that their agreement was unworkable and would have to be revised "for both commercial and legal reasons", and that Stern's lawyer should contact Mott (244-245A). Oztemel's recollection of that meeting was that he recognized Stern as having made the IBM contract possible, for which he was willing to pay him $100,000, but since he had no *further* need for Stern's services, he refused to recognize the Stern-Satra contract or make any additional payments thereunder (722-723A, 745-746A, 767A). Oztemel no longer needed to recall the reasons he had earlier given Stern for their great inter-relationship and why they should become partners (691A, 792A).

Thus, Oztemel reneged again, and Satra made no further payments to Stern (248A). In January 1972 Stern commenced this lawsuit. Oztemel answered denying that there was a contract between them, claiming that Satra had secured IBM as a client through no effort of Stern, and alleging that Stern's claims were fraudulent.

(5) *The 1973 IBM Agreement*

IBM became unhappy with Satra's performance by November. Satra, without IBM's consent, had been representing itself as IBM's agent in Russia, even after having been warned by IBM to stop this self-advertisement (983-984A). Further, IBM found it had little need of Satra's bartering capabilities in order to realize money on Soviet sales (982A).

If IBM sales did not reach $50 million a year by 1974, IBM could terminate its contract, subject to a continuing two-year obligation to Satra for sales then under negotiation (985A, E22). If, however, IBM sales received Commerce Department approvals, Satra could make millions: the IBM sales projected for the Kama River project would

be around $100 million (996A), $10.5 million for the Intourist reservation system (for which an order had been obtained) (992A), another $10.5 million for an Aeroflot system, and around $150 million for an air-traffic control system (996A). Thus Satra could realize some $9.5 million in commissions if these deals totalling $271 million went through. It was a gamble for Satra which it didn't want to share with Stern—but in which IBM became unwilling to have Satra participate.

Satra and IBM thereupon, on June 26, 1973, executed another agreement, according to Oztemel, to "replace" the existing contract (E94). Under this replacement agreement Satra was to receive a monthly "fee" of $16,667 for its administrative services and a monthly "advance" of $9,350 against commissions to which it would have been entitled, under its 1971 contract, if the Intourist sale went through, although this advance against commissions would be returned to IBM if the export license was not approved (E 41-42). This 1973 agreement, terminable by either party after February 1, 1977 and yearly thereafter (E 44-45), is still effective as between IBM and Satra and, failing termination, runs indefinitely.

ARGUMENT

POINT I

THE DISTRICT COURT'S REFUSAL TO INCLUDE SATRA'S REQUEST FOR AN INNOCENT MISREPRESENTATION CHARGE DID NOT CONSTITUTE ERROR, BUT IF SO THE ERROR WAS HARMLESS AND CAUSED NO SUBSTANTIAL PREJUDICE TO SATRA'S RIGHTS.

Satra contended in its pleadings that Stern should fail in his claim, even if a contract existed between them, for two reasons: (a) a failure of consideration on the ground that Satra's contract with IBM was obtained without Stern's efforts and (b) fraudulent misrepresentations made by Stern which induced Satra to enter the agreement. Both of these defenses were properly charged to the jury, and the jury rejected both. After both sides had rested following the taking of evidence, and following Judge Lasker's summary, to the satisfaction of both parties, of the issues to be charged (834-836A, 881-882A), Satra requested an additional charge that *innocent* misrepresentations of Stern also entitled Satra to rescind the contract (881-882A). Judge Lasker refused to make this redundant charge (885A), and his refusal is amply supported by the record on three separate bases:

(i) Stern's representations were statements as to his opinion, and as such could be either fraudulent or factual; such misrepresentations could not be innocent. In plain terms, one may lie or tell the truth about what is in his mind (whether the item in mind is an accurate or inaccurate perception of an event), but one cannot be innocent if he has misrepresented what he is thinking.

(ii) As a corollary of the foreging, Judge Lasker charged at Satra's request that if Stern had not delivered IBM, as Satra claimed he had promised or represented (*i.e.* if IBM had contracted with Satra

independently of Stern's efforts), there was no consideration for the contract, and Satra was entitled to rescind. The jury's finding for Stern constituted a rejection of this defense and a finding that Stern had either not misrepresented or that he had delivered that which he had represented—findings that completely dispose of Satra's charge.

(iii) Most significantly, the evidence was abundantly and redundantly clear that Satra did *not rely* on the representations allegedly made by Stern.

In sum, the record shows that Satra was not induced to contract with Stern based on any misrepresentations made by him (if indeed he made any misrepresentations), and the District Court's failure to charge innocent misrepresentation was not error and did not prejudice Satra.

A. No Reliance

The testimony proves (a) that Satra was not induced to contract with Stern in reliance on any misrepresentations made by him—innocent or fraudulent, and (b) that Satra had tried, and failed, to secure IBM as a client and was willing, if Stern could persuade IBM to be a client, to give Stern a percentage of the revenue Satra would thereby earn (so long as it did not have to pay Stern anything for his efforts if he did not succeed), and (c) that Satra never relied on anything Stern stated and had sufficient access and experience to make its own judgments on the purposes and desires of IBM.

First, there were read into the record *admissions* by Satra, uttered by Ara Oztemel, its president, executive committee head and chief executive officer. Oztemel said that it made no difference whether or not it was Stern who convinced IBM to go into the Soviet market or to contract

with Satra (these being the alleged misrepresentations of Stern). In Oztemel's words:

> "[T]he important thing is who brings you a certain business. . . . Whether he convinced them, whether they met just in front of the door, it wouldn't make a bit of difference" (436-437A).

And again, when asked if Stern could change IBM's mind about going into the Soviet Union, Oztemel answered:

> *"I don't believe Dr. Stern had enough influence there to change their mind"* (Emphasis added) (437A).

Further, Oztemel conceded that Stern had not, in fact, made any misrepresentations:

> "As far as I was concerned, it was Dr. Stern who brought up the idea of IBM. It was he who introduced me to IBM and it was he who eventually helped us to conclude the deal." (437A).

Second, testimony at the trial directly contradicted Satra's assertion that Stern misrepresented the facts or that, if he did, Satra relied thereon.

It was clear to Oztemel, for example, that Stern had no "direct line" into IBM, that IBM was not even familiar with Stern, that Stern knew no one at IBM and had no long-standing friendship with IBM personnel (787A), and actually was meeting the IBM people *for the first time* together with Oztemel (848A). In fact, Gilbert Jones, IBM World Trade's President, at his first meeting with Oztemel and Stern, mistook Oztemel for Stern (797A, 847-848A).

Stanford, then an executive of IBM and later an officer of Satra, told Oztemel that IBM wanted to retain an intermediary for purpose of gaining entry into the Russian

market and was considering both Satra and an Italian firm, Savaretti (with which Stern had *no* connection), and that IBM had begun this consideration prior to meeting with Stern and Oztemel (793-794A).

Oztemel believed and testified that IBM contracted with Satra because of IBM's need for the "irreplaceable" services of Oztemel, not those of Stern, whose services Oztemel did not believe were required (771A) and whose person he clearly believed replaceable (800A). And the IBM-Satra agreement specifically provided that it was terminable at any time *Oztemel* ceased being actively engaged therein (Exhibit I, Par. III-A at E-5).

Third, Oztemel's attempt to pay Stern $100,000 for his introduction to IBM constituted a clear recognition, in the terms Oztemel understood best (*i.e.,* cash), that Stern *was* responsible for bringing IBM to Satra (723A). If, as Oztemel conceded, Stern's services were worth a finder's fee, that meant that Satra's complaint was not that Stern had misrepresented or that Satra had relied on what Stern allegedly said, but that Oztemel, in hindsight, thought Satra's contract with Stern too generous.

Judge Lasker was altogether correct in refusing Satra's request for a further charge which was just another variant of its basic defense, a defense that was fully argued by its counsel and charged by the District Judge but, to Satra's dismay, flatly rejected by the jury.

It is clear that Satra was *not induced* to contract with Stern based on Stern's representations. The contract was based on *one* thing only: if Stern could accomplish what Satra had tried and failed, bringing IBM to Satra as a client, Stern would be entitled to a 50/50 deal. If Stern had not produced, there would have been no payment—and Satra in no way acted in reliance or to its detriment.*

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* Stern spent months of his time, gave up other employment opportunities and expended large sums in traveling to-and-from New York and Los Angeles in trying to realize on the enormous economic

Not only did Satra *not* rely on Stern's representations, but for it to have done so would have been unreasonable. As Judge Lasker charged, and as the law clearly states, the party claiming to have so relied must have exercised ordinary care for the protection of its interests and is charged with knowledge of all the facts which would have been uncovered by a reasonably prudent person (908A). *Sylvester* v. *Bernstein,* 283 App. Div. 333, 127 N.Y.S.2d 746 (1st Dept.), *aff'd,* 307 N.Y. 778 (1954); *Dannan Realty Corp.* v. *Harris,* 5 N.Y.2d 317 (1959). For such an experienced and sophisticated trader as Oztemel, and his staff of accountants, lawyers and international business experts, to have relied (or even to have claimed they relied) without any check or investigation on any representations Stern was alleged to have made is of itself incredible and unreasonable.

B. Judge Lasker Fairly and Adequately Instructed the Jury on the Issues of the Trial

Satra's defense is that, notwithstanding that a contract between Stern and Satra existed (and so the jury found notwithstanding Satra's protest to the contrary), Satra has the right to rescind since it was induced to enter on Stern's misrepresentations.

Satra testified that Stern claimed he had substantial contacts with IBM and could influence IBM's decision not only to enter the Russian market but to use Satra as its intermediary and that, without Stern IBM would not consider Satra (*see* Satra's Brief at 7-8). Stern denied that he ever made such statements (178-179A, 183A, 191A, 190A, 207-208A). His testimony, which the jury apparently believed, was that he persisted in pursuing IBM, notwithstanding the pessimism of Oztemel and others at Satra

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potential of the very slight possibility of an IBM contract. Satra, sure in advance of Stern's failure and more and more convinced that Stern's efforts were meaningless, just sat back and let him work, until the barely-possible became the fact, after which Satra worked over-time to squeeze Stern out.

(205A), and ended up with a contract. Satra's allegations of misrepresentation are an excuse not to honor its contractual obligations.

Satra now claims that the jury was not given the opportunity to determine that Stern made innocent misrepresentations on which Satra relied, whereby it had the right to rescind. But this presumes not only reliance, which did not occur, but also misrepresentation.

Stern's representations as to his prowess reflected his opinion (puffed or conceited perhaps) of his value to Satra; and it was an evaluation in which Satra, having witnessed Stern in action, concurred (792A). Thus Stern's opinion of his importance to IBM could constitute an erroneous or egocentric belief, but not a misrepresentation—and so the jury found for it was specifically instructed, without objection by Satra, to distinguish opinion from fact (904A, 932A).* Since Stern's statements were not misrepresentations, they could hardly have been *innocent* misrepresentations.

Judge Lasker summed up the contentions of the parties as to these matters without exception by either. He advised the jury that Satra's claim was that Stern had advised Satra that it could not secure IBM as client without Stern's

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* Satra also refers in its Brief (at 18) to the distinction made by Judge Lasker between deliberately expressing untruths and expressing opinions which may be wrong. By using the court reporter's punctuation, Satra misconstrues what Judge Lasker said. It might better and more clearly be read with the below bracketed portions omitted:

> "I believe you understand, ladies and gentlemen, because the subject seems to be very close to lay experience, or ordinary experience, *the difference between deliberately telling somebody an untruth or merely expressing an opinion* [which you don't believe—how can I put it?—] *in which there is no deliberate intention to misrepresent.* (Emphasis added) (915-916A).

That this was what Judge Lasker fairly conveyed to the jury is confirmed by his identical instruction at another point in his charge, quoted on the following page (see record 907A).

influence and abilities and that Stern, in fact, had no such influence or abilities (903A).

Judge Lasker also charged that if Stern misrepresented what he thought his importance was to Satra "without knowing whether it [his assessment] was true or false" the jury could consider that he made the representation with intent to deceive Satra, enabling Satra thereby to disaffirm the contract (907A). Thus, Judge Lasker instructed:

> "If you find that Dr. Stern made a material misrepresentation knowing that the statement he made was false, you would find he intended to deceive Satra. Furthermore, even if you were to find that Dr. Stern made the misrepresentation *without knowing whether it was true or false but pretending* that he had exact knowledge of the situation when he did not, you can find that he intended to deceive Satra." (Emphasis added) (907A)*

In addition, Judge Lasker charged in accordance with Satra's request, concerning failure of consideration,

> ". . . [Y]ou must decide in this case whether Dr. Stern did what he promised to do, or, put another way, whether Satra got what it bargained for under the agreement. If Dr. Stern did not do what he promised to do so that Satra did not get what it bargained for, then Satra would have no further obligations to Dr. Stern and you should find in its favor." (908A)

The jury's finding for Stern indicated that it found Stern had helped deliver IBM to Satra. Satra's further request for a charge on innocent misrepresentation was merely redundant, since even if Stern had misrepresented what he

* Satra's Brief complains that Judge Lasker instructed the jury that a willful misrepresentation of an opinion cannot constitute an intention to deceive (Satra Br. at 17-19). Satra's argument is based on a misreading of the instruction quoted in the footnote on the previous page, and neglects to take into consideration the instructions quoted in the text.

could do (and whether or not this misrepresentation was innocent) Satra had not relied thereon and Stern had, in fact, as the jury found, delivered IBM.

At no point during the trial, and notwithstanding extensive pre-trial discovery, had Satra adduced any evidence directed at innocent misrepresentation. Satra's last-minute contention could not have been based on newly-discovered evidence, as none was elicited. Satra's request merely constituted a newly-conceived way to reframe its previous charge. Judge Lasker's refusal to give the jury this additional instruction was eminently sound. To emphasize, by repetitious and redundant instructions, the contentions of one party to an action can only confuse the jury and prejudice the other party. Judge Lasker's charge was balanced and fair, and without error.

The jury found in Stern's favor. Satra should not be permitted further to postpone its day of reckoning.

C. Harmless Error

There are few trials, as there are few matters in life, that cannot stand criticism. But a trial is not an exercise in gamesmanship. The criterion for error is that it affects a substantial right; perfection is not the criterion. An appellate court will not reverse if the jury has been fairly and reasonably charged so as to enable it to deliver a responsive verdict. In a leading treatise on federal jury instructions, the duty of the trial judge is explained.

> "A federal district judge has the obligation to instruct the jury as to the law and he should explain the issues and give reasonable guidance to the jury on the facts of the case. He has a wide discretion in doing so." 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 7.01 (2d ed. 1970).

Of course, if an issue has been tried, though not raised in the pleadings, an instruction on that issue is required. 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2556 (1971). Where an issue has not been presented by the

pleadings or effectively raised at the trial, however, there need be no charge. *Ibid.* Further, a charge should not be given on a matter if not supported by the evidence. *Ibid.* Judge Lasker was correct not to give Satra's redundant charge (885, 930A).

In *Godaleta v. Verderlandsch-Amerekansche Stoomvart,* 291 F.2d 212 (2d Cir. 1961), the Second Circuit applied the rule that a charge is properly refused when no evidence as to the charge is presented. There the trial court refused plaintiff's charge as to defendant's duty of care on the ground that the record revealed no evidence from which a finding of negligence could be made and this Court upheld that ruling. *See also Mandel v. Pennsylvania R. R. Co.,* 291 F.2d 433 (2d Cir.), *cert. denied,* 368 U.S. 938 (1961) in which this Court ruled that when an issue is submitted to the jury on which there is no evidence, it is reversible error.

Rule 61 of the Federal Rules of Civil Procedure states the Harmless Error Rule, *i.e.,* that to set aside a judgment or order, the error complained of must have been prejudicial to the substantial rights of the appellant. As here applied, there is no ground for reversal unless error in the charge caused Satra to lose its case. It is clear from Oztemel's admissions and the previous discussion herein that a charge of innocent misrepresentation would not have changed the result of this case.

The function of the appellate court is to satisfy itself that the instructions, considered as a whole, show no tendency to confuse or mislead the jury. *See Begley v. Ford Motor Co.,* 476 F.2d 1276, 1280 (2d Cir. 1973); 9 Wright & Miller, *supra* § 2558. Errors in instructions are routinely ignored if they clearly do not affect the results. 7 J. Moore, Federal Practice § 61.09 (1948, Supp. 1975). As stated in Moore, *supra* § 61.11 at 61-43:

> "Judge Frank's comment [In re Barnett, 124 F.2d 1005, 1011 (2d Cir. 1942)] that '. . . the doctrine of

> "harmless error" . . . to the chagrin of those devoted to the conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which do no real harm' indicates that the courts of appeals recognize the sound judicial practice and common sense which Rule 61 enunciates."

In *Kenmarec* v. *Compagne*, 358 U.S. 625, 629 (1959), the Supreme Court refused to reverse the Southern District of New York because of an erroneous charge when it found the jury's findings precluded a favorable decision for defendant even if the correct charge had been given. Similarly, no reversal will be had where error was made and is determined to be unsubstantial. *Farnarjian* v. *American Export Isbrandtsen Lines, Inc.*, 474 F.2d 361, 364 (2d Cir. 1973) (District Court did not commit error, or error was harmless, in refusing plaintiff's request in seaman's action to equate proximate cause with "slight" cause. Taken as a whole, the jury was given to understand the point by other, although less favorable, instructions, and the facts were such as not to make a difference in the outcome.); *Srybnik* v. *Epstein*, 230 F.2d 683, 685 (2d Cir. 1956).

As Prof. Moore has stated: "the integrity of verdicts, orders and judgments is the rule and the disturbance thereof is the exception." More fully,

> "There can be no doubt but that the integrity of verdicts, orders and judgments is the rule and the disturbance thereof is the exception. To entitle himself to relief from a verdict, order or judgment, a party must show that his case is within the exception. Error is not to be presumed but must be affirmatively shown. And the appellate courts will disregard harmless errors and reverse only for errors prejudicial to substantial rights of the parties. Thus in *Palmer* v. *Hoffman*, Mr. Justice Douglas pointed out that 'mere "technical errors" which do not "affect

> the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court . . . He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted' [318 U.S. 109, 116, 63 S.Ct. 477, 482 (1943)]." 7 J. Moore, *supra* §61.11.

Satra has failed to carry its burden of showing "that prejudice resulted" from the error it claims Judge Lasker made, and that the addition of its request to Judge Lasker's charge would have made a difference. Judge Lasker did not commit reversible error.

POINT II

THE DETERMINATION OF THE DISTRICT COURT AS TO THE APPLICATION OF THE EXPENSE SCHEDULE WAS NOT CLEARLY ERRONEOUS.

Stern testified at length as to how the expense schedule came into being and precisely what it was intended to mean.* He testified that Satra was unwilling to submit to an audit of expenses** (to the extent that it did in fact, incur expenses) and that a schedule was agreed upon to establish arbitrary progressions of expenses which would be set-off against revenues on an incremental basis as and when Satra received revenues.

Satra argued that the parties had not reached agreement on the expense schedule, that the failure was material and, therefore, that no contract had been made. The jury found

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* Pages 10-12, *supra*.

** As Satra's attorney testified: An audit "was clearly unacceptable to us" (469A). "[W]e wouldn't want outsiders going through our books and doing their own kinds of audits for this kind of purpose . . ." (470A).

in favor of Stern,* thereby finding that his testimony of what had been agreed upon was credible and Satra's was not. Independently, Judge Lasker, in the damages hearing, also found that Stern's testimony as to the expense schedule was credible and Satra's was not**.

Satra insists (Satra's Brief at 19) that the District Court's interpretation of the expense schedule was faulty in three particulars, none of which is true. Thus:

> (1) The court did *not* ignore the language of the agreement, but took into consideration all its parts in the context of all the dealings between the parties. Satra's real complaint is that the Court read the agreement differently from the way Satra wished.
>
> (2) The Court did *not* rely on only one conversation concerning the agreement instead of *all* the circumstances. The court heard and examined witnesses, saw charts, heard argument—all directed to the interpretation of the expense schedule and concluded, contrary to Satra's desire, that "[t]he extensive and detailed testimony of Stern on that point . . . is highly persuasive and was unrefuted in its essentials by any defense witness" (36A).
>
> (3) The Court did *not* disregard the rule that in interpreting contracts it should avoid strained readings leading to unreasonable results. The court determined that the meaning of the contract was, to Satra's dismay, reasonable and plain and as Stern had testified.

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* The jury was charged: "If you find that the expense schedule was a material part of the agreement and the parties did not have a meeting of the minds as to the operation of the expense schedule, then you should find that there was no contract between them and you would find in favor of Satra." (910A).

** There were three persons involved in working out the expense schedule, Stern, Mott and Hermann (142-150A, [illegible]5-350A, 517-518A). Although Hermann was available, Satra never called him to the stand to refute Stern's evidence or bolster Mott's.

To examine this thesis more closely it is important to remember the genesis of the contract. Oztemel despaired that IBM would ever retain Satra's services and was unwilling to pay Stern a salary. Stern's insistence on having a contract led to a series of negotiations where Satra offered and then backed away from sizeable salaries. Each time Satra made an offer involving a cash outlay, it reconsidered and substituted a percentage of revenues. Satra itself took no gamble, paid no money. Its offer to Stern could have resulted in pie-in-the-sky or a lot of money, but money always from third parties and never out of Satra's pocket.

After a series of such retrenchment discussions, Stern insisted on a written contract offer (Exhibit C, August 31, E 7), to which was appended an expense schedule which Satra had proposed and to which Stern had acquiesced in the course of modifying a prior (Exhibit B, August 25th, E 4) offer, thereafter withdrawn.

Satra was willing to give Stern, on a quarterly basis, 50% of its annual revenues less arbitrary expense figures. Stern testified (a) that the expenses were arbitrary, (b) that they were to be a *function* of revenues to be charged as revenues accrued and not to be deducted if no revenues came in, (c) that they were to be applied annually so that the largest incremental progression would be charged against the first dollars of revenue in each year and (d) that the steps of incremental progressions were agreed upon and became part of the Stern-Satra contract (Exhibits C and D, E 6, E 10). Stern's testimony describing the discussions and the agreement appears earlier herein (pages 10-12 *supra*). The jury and Judge Lasker both credited that testimony, and found in accordance therewith.* There are no grounds on which to disturb those findings.

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* The jury, prior to verdict, asked that all testimony on the expense schedule be reread to it. Counsel selected the relevant por-

Satra appeals for an interpretation of the schedule different from that agreed to by Stern and the two Satra executives who negotiated with him, Mott the lawyer and Hermann, the accountant, based on what Satra maintains is a "fairer" and "more reasonable" approach.*

Satra's argument is irrelevant, first because Satra was never able to prove its actual expenses** and second, and more important, because it is not the job of the court to redraft a contract but to enforce it according to the meaning the parties actually intended. As Satra's attorney, Hanno Mott, admitted, it was Satra's intention to prepare a schedule that would "arbitrarily . . . assign . . . expense to the IBM contract which would be used to reduce the revenues, the commissions from IBM, once they came in" (471-472A). Oztemel testified that expenses *over* the first $100,000 would be deducted pro-rata (1101-1102A), although he gave no cogent reply when the District Court asked him

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tions of the transcript (934A, 1028A). The jury's verdict for Stern reflects its finding that his tesimony was credible and Satra's version was not. Indeed, the jury could hardly have found that a contract was made without accepting Stern's testimony and rejecting Satra's.

Judge Lasker considered that he was not bound by the jury verdict, and found also for Stern on this issue.

* Thus Satra claims (Satra's Brief at 23) tha the District Court's interpretation is "unfair" since, hypothetically, Satra could have expended $100,000 per year for some 4 years as against no earnings, and have been reimbursed, should it have earned $250,000 in the 5th year, for only the $100,000 expended as a function of earning that $250,000 in the 5th year. Since only arbitrary and not actual expenses are scheduled, conceivably Satra could have expended only $50,000 over the first 5 years and thus recouped twice its expenditure on the 5th year.

** Significantly, Satra was unable to prove any unreimbursed expenses allocable to the IBM contract. A schedule purporting to reflect its expenses was conceded by its counsel to be arbitrary and was ruled inadmissable as to its contents (978-979A). Satra's brief nevertheless refers to this schedule as support for its contention that Satra incurred expenses (*E.g.* Satra Br. at 9, fn.)

to justify the different treatment he expected for the first $100,000 (1103A). And the language of the contract is consistent, for it calls for *quarterly* payments, *incremental* and equivalent steps equally applied to both *annual* expenses (in the arbitrary amounts and increments stipulated in the schedule) and *annual* revenues, and *annual* (*not cumulative*) recoupment of expenses (per schedule) from revenues.*

The jury verdict is supported by substantial evidence and the finding of Judge Lasker is not clearly erroneous. Satra is again attempting to renegotiate, as it did with its $500 per day Kama River offer, with its $90,000 per year plus percentage offer and with its several other offers. The jury and the District Court heard, saw and questioned all the parties. This court should refuse to abet Satra in its game, and affirm the decision below. *See Collins* v. *Penn Central Transp. Co.*, 497 F.2d 1296, 1297 (2d Cir. 1974) ("We cannot set aside the verdict of the jury unless, when viewing the evidence in the light most favorable to the prevailing party, 'there is a complete absence of probative facts to support the conclusion reached' by the jury."); *Lassiter* v. *Fleming*, 473 F.2d 1374 (2d Cir. 1973) (Where facts were in equipoise at bench trial, and the appeal challenged inferences drawn by the District Judge, the Second Circuit affirmed, stating: "Where factual findings are challenged. . ., we may not set them aside 'unless clearly erroneous.' "); *Langford* v. *Chrysler Motors Corp.*, 513 F.2d 1121, 1127 (2d Cir. 1975) ("Unless clearly erroneous, the evaluation of the credibility of witnesses and the weight of the evidence is the responsibility of the trial judge.")

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* The contract language is:

> "These commissions will be paid quarterly after an amount equal to expenses has been recouped in each year." (E 7)

Mott (and others) testified that the "expenses" contemplated by the contract were the arbitrary amounts stipulated by the schedule (471-472A).

POINT III

THE DISTRICT COURT'S DETERMINATION THAT THE 1973 IBM-SATRA AGREEMENT CONSTITUTED A REPLACEMENT AND RENEWAL OF THE 1971 IBM-SATRA AGREEMENT WAS NOT CLEARLY ERRONEOUS.

When Stern and Satra entered into their agreement to share "all amounts accrued by Satra during the term of any agreement signed by Satra with IBM . . ." as well as payments "during the term of any renewal of such agreement" (Exhibit C, Par. I-B at E-7) the IBM-Satra agreement had not yet been made. In fact, Oztemel was still very doubtful that such would ever come to pass (198-199A, 203-204A).

But the IBM agreement, as we know, was signed and moneys from IBM paid. The agreement was entered on September 22, 1971 for a 5-year term which could be terminated, on certain conditions, no earlier than September 1, 1974. *Prior* to that date, and without consulting Stern, IBM and Satra *"replaced"* their 1971 agreement, as Oztemel himself so clearly stated (E-94), with the 1973 agreement. The 1973 agreement is clearly a "renewal" to which Stern's percentage rights attach.

And so the District Court found, after full and complete testimony by Satra and IBM. It reasoned that Stern and Satra entered into an agreement to share in any revenue from IBM as long as (a) Satra was being compensated for substantially the same services it was then expected to perform for IBM and (b) Stern remained ready and willing to do his part.* The District Court found (39-40A), on the basis of the testimony of IBM's Mr. Witham, that Satra was expected to continue essentially the same services under the 1973 agreement as it had performed under the

* Hanno Mott confirmed that Stern's rights were to be coterminous with "the length of any agreement" between Satra and IBM as same might be "amended for any reason other than its term" (E-55).

1971 agreement: administrative services (983A, 985A, 988A, 991-994A) and assistance in barter transactions (992A).*

All that changed, essentially, was the method of compensation, with IBM and Satra agreeing on flat monthly payments in lieu of the considerable, though speculative, opportunity arising from the Soviet interest in $271 million worth of contracts which, if they had come to pass, would have given Satra the right to $9.5 million in commissions. In this regard, of the cases cited by Satra, only *Master Institute of United Arts, Inc.* v. *United States*, 167 F.2d 955 (2d Cir. 1948) has any significance for the case at bar.** Judge Augustus Hand wrote, *id* at 957, that the "determining factor" in deciding whether one contract is a renewal of another is "the extent of the modification . . ." which "like many other legal standards, is a matter of degree." Judge Lasker quoted this rule as particularly pertinent when an agreement is drawn by lay principals (Oztemel and Stern), but stated that even if the word "renewal" was technically construed, the substitution of a new obligation to "replace" an existing one would fall within the definition of "renewal" (41A). That is, indeed, the only practical construction; the Stern-Satra contract would have been illusory if, the day after it was made, Satra could have reneged and replaced it with a slightly different version negotiated with IBM, made more advantageous to Satra by the elimination of Stern's rights.

Judge Lasker's rulings were not clearly erroneous. *See Lassiter* v. *Fleming* and *Langford* v. *Chrysler Motors Corp.*, cited *supra* p. 36.

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* The barter services were the same excepting that Satra, if it so elected, could decline to so engage itself, thereby *reducing* its burdens, for which it should not be allowed to complain.

** The cases to the contrary cited by Satra in its Brief (at 31-34) are the same cited to, and rejected by, the District Court (38-39A). Those cases are inapposite, having to deal with matters unique to real estate brokers, dealing essentially with statutory rent-controlled leases.

POINT IV

THE DISTRICT COURT ERRED IN FINDING THAT "RETAINERS" AND "ADVANCES AGAINST COMMISSIONS" PAID BY IBM TO SATRA UNDER THEIR 1973 AGREEMENT SHOULD BE TREATED DIFFERENTLY FROM THE TREATMENT OF SUCH PAYMENTS UNDER THEIR 1971 AGREEMENT, i.e., WITHOUT DEDUCTION PURSUANT TO THE EXPENSE SCHEDULE.

The Stern-Satra agreement provided, and so Oztemel wrote by hand at the foot of the expense schedule (E-9):

> "[A]ny retainers received will be divided 50-50. Other income as above schedule"

The addendum was written following Stern's acquiescence in Satra's renegotiation of the straight 50/50 sharing on which they had earlier agreed, by the injection of the expense schedule hereinabove in Point III discussed. The expense schedule which Mott, on behalf of Satra's executive committee, proposed as the condition for agreement cut down Stern's share appreciably, from 50% to 30% at annual income levels below $250,000, with Stern's share progressively increasing at higher levels (147-148A).* When Oztemel pushed Stern to accept that alternative, in preference to the whittled-down salary-plus contingency feature of the second alternative of the Stern-Satra agreement, Stern agreed, provided Oztemel would agree to remove "retainer" income from offset by the expense schedule (156-159A). Oztemel did agree, and wrote the addendum quoted above.

Satra's usual business practice was to obtain retainers from its clients, monthly or at other periodic intervals, aggregating $100,000-$300,000 per annum per client (855A;

Assuming $150,000 income, the offset for expenses (100,000/250,000), equaling $60,000, leaves $90,000 to share equally, or $45,000 to Stern. The result is a 70/30 split.

E-61-62). This retainer income, plus the commissions Satra earned from switch-and-barter transactions (by which it converted Russian payments in the form of commodities and "soft" currency into Western currency) were the customary sources for Satra's income. Oztemel's addendum was written with this practice in mind, and was intended to create a 50/50 relationship with respect to all retainer income, without offset per the expense schedule.

And so the IBM-Satra contract was applied. The first moneys which Satra received from IBM under their 1971 contract, a $25,000 advance against commissions to be earned, were split 50/50, and Satra paid Stern $12,500 (244A). Satra conceded that if the agreement had not been terminated, it would have paid Stern half of IBM's next $25,000 advance. This was in accordance with Satra's customary definition of retainers.

The 1973 agreement between IBM and Satra changed the compensation format. Satra was entitled to receive, and has been, in fact, receiving (a) monthly payments of $16,667 to cover all administrative expenses and (b) monthly payments of $9,350 as advances against the commissions Satra will earn under the 1971 agreement of a Commerce Department license is given for IBM's export of a $10.5 million computer to Intourist.*

The District Court held that *neither* of these series of payments under the IBM agreement constituted "retainer" payments. It ruled that the word "retainer" was meant to apply only to *initial* payments Satra received ("cash on the barrelhead") on signing the IBM agreement and not periodic payments (42-43A).

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* In the event that IBM fails to consummate this sale and receive payment from the Soviets, these $9,350 payments are to be refunded.

For this interpretation the District Court relied, so it claimed, on the circumstances which led up to Oztemel's hand-written notation (43-44B). The expense schedule, without the addendum, would have permitted Satra to deduct its expenses from any and all revenues received from IBM. Oztemel, it should be remembered, urged Stern to accept the alternative that eliminated Satra's obligation to pay Stern 6 month's salary (reduced from the one-year's salary requirement of the prior "agreement") (465A, 501A). Stern protested to Oztemel that he needed current income in order to live—and did not want any reduction applied against "the retainer*s* or the advance*s*" (plural emphasized) Satra anticipated receiving if the negotiations with IBM proved successful (158-159A). Oztemel agreed: that was the carrot he used to induce Stern to accept the alternative under which Satra had no salary obligation to Stern. The District Court's construction that retainers meant "cash on the barrelhead" neglected to consider this testimony and substituted the Court's understanding for that which the parties had reached. Stern had asked not for a *single* and *immediate* payment but an on-going, recurring, cash flow.*

Stern was clear as to what he meant by "current income" and so expressed himself to Oztemel. Stern made no reference to "immediate" or "present" income; he sought *on-going* or recurring income. Just prior to the portion of

* The District Court said that its interpretation was based on Stern's need to pay for the "required move from California, where he then resided, to New York." (30A) But it is clear from the testimony that Stern did not intend to move from California or relocate his family (163A, 320A, 324A). For example, on cross-examination (320A): "A. We discussed the fact that my family and I have come to a firm decision we are not going to relocate the kids and things like that. So that I would have a heavy expense travelling back and forth. I would have an apartment here, and those would be expensive. We discussed that I would need some reasonable salary over and above those kind of expenses."

Stern's testimony quoted by the District Court (43-44A), Stern stated his desire precisely:

> "[B]y current income I mean income every month or quarterly or what have you. I have to now look for a course of current income from our revenues from the clients"

Stern then went on to explain:

> "[N]ormal arrangements with clients were in two parts, the *first* being current income in the form of retainers or advances . . ." (158A).

It was based on this explanation that Oztemel is then quoted as having agreed to write the addendum, since the "reimbursement schedule really is logically associated with expenses on *sales and future* commissions not current, on-going payments" (159A, 1052-1053A).

The District Court cites BALLANTINE'S LAW DICTIONARY (1948) as authority that a retainer is the "preliminary fee given to secure the services of a solicitor or attorney". Laymen's dictionaries,* however, make no distinction as to preliminary or initial fees and define retainers as the fees paid to secure legal or other professional services. It is certainly clear to most practicing lawyers that retainer fees need not be single payments, but may be *on-going payments* entitling clients to continuing services. But more important, *Satra itself defined "retainer"* as on-going recurring payments. When asked if one of the usual ways Satra was paid its fees was by retainers and whether they were on-going fees, Oztemel testified that Satra, depending on the client, was paid "monthly, quarterly, annual, semi. . . . I don't know which is more predominant" (855A). All such are recurring, on-going retainer payments.

* *See* Random House Dictionary of the English Language (1967); The American Heritage Dictionary of the English Language (1971).

Stern was, by the clear language of the addendum, to receive *all* "retainers" without expense schedule deduction. That Satra so understood the language is proved not only by Oztemel's statement but by the 50% payment made to Stern of the first $25,000 *advance* Satra received from IBM. Further, when the Stern-Satra agreement was negotiated, it was contemplated that Satra would receive large and continuing retainers from IBM, as it did from its other clients. These, then, are the retainers as to which Oztemel agreed that no expenses would be deducted; and this is especially the case since Stern's agreement preceded the IBM agreement by a month.

As to the $16,667 payments under the 1973 IBM agreement, they clearly constituted retainers since they were on-going periodic flat-sums. Mr. Witham of IBM called them "retainer fees" while particularizing them as all-inclusive fees paid for services anticipated from Satra (100-A).

What is true for the $16,667 retainer fees is just as clear as to the $9,350 "monthly advances" made under the 1973 IBM agreement. To the extent that these payments constitute advances against commissions, they are not different from the original $25,000 fee which Satra has, by its 50% payment to Stern, previously conceded as constituting retainers.* Just as the original $50,000 was an advance paid to Satra in anticipation of IBM's sale of equipment to the Chemistry Ministry, the $9,350 advances were being paid in anticipation of IBM's sale of equipment to Intourist. Satra conceded it was obligated to pay Stern 50% of the Chemistry Ministry sale advances, and it is equally obligated to pay Stern 50% of the Intourist sale advances.

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* The $9,350 advances were installment payments of Satra's 3.5% commission on the $10.5 million contemplated sale to Intourist—provided the Commerce Department license was secured, and if it were not, these advances were to be refunded (992A).

The two advances are identical—and Stern's percentage rights therein should be treated identically.

For Satra to have argued that these retainers and advances are *not* retainers and advances subject to the Oztemel addendum is merely part of Satra's continuing renegotiation of the contract.* The District Court erred in lending itself to Satra's design in this aspect of its rulings and this Court is here requested to correct its misinterpretation of what the parties agreed and what Oztemel wrote.

The preceding discussion makes clear that the testimony on "retainers" was not disputed. Judge Lasker came to his own view of what the term should mean, from considerations outside the evidentiary record. In such circumstances, this Court is "in as good a position as the district judge" to decide the issue. *See Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2d Cir. 1972); *Concord Fabrics, Inc.* v. *Marcus Bros. Textile Corp.*, 409 F.2d 1315, 1317 (2d Cir. 1969) ("As we have before us the same record, and as no part of the decision below turned on credibility, we are in as good a position to determine the question as is the district court.")

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* Satra argues that it is unfair for it to incur expenses and yet pay Stern a full 50% without deduction for these expenses (assuming it did incur expenses, a point which it failed to prove—see p. 35, *supra*, fn.). It should be remembered, if unfairness is the issue, that Satra denied Stern the right to his contract, and the full ability to exploit, with Satra, the profit potential of the contract with IBM, Stromberg-Carlson and other companies, let alone the considerable expense and aggravation of this prolonged proceeding. Satra's argument of unfairness comes with bad grace.

POINT V

THE DISTRICT COURT ERRED IN DETERMINING, WITHOUT ANY SUPPORTING EVIDENCE, THAT MITIGATION OF DAMAGES WAS APPLICABLE AND IN SETTING A PERCENTAGE FIGURE THEREON.

A. The Rule of Mitigation is to Prevent A Party's Recoupment of Additional Profits, and Not to Permit the Breaching Party to Reduce Damages Actually Incurred.

The rule of mitigation is that unless one's earnings could not have been gained "but for" another's breach, such earnings are *not* to be deducted from damages. The rule is stated in the Restatement and by Professor Corbin, as follows:

> "Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable unless such gains could not have been made had there been no breach." RESTATEMENT, CONTRACTS § 336, Comm. c (1932); 5 CORBIN, CONTRACTS § 1041 (1964).

The rule of mitigation is to assure that while the injured party is made whole by the defendant, he does not profit from the breach. Thus a party cannot obtain a double salary, one from his defaulting employer and a second from his new job. Similarly, one cannot recover a double profit with respect to specific goods. *Ibid.* But that is the extent of the rule, for the law presumes that a party can find numerous opportunities for his talents and skills. *See Haughey v. Belmont Quadrangle Drilling Corp.*, 284 N.Y. 136, 142 (1940). A defendant must show, by competent and affirmative proof, and it is clearly defendant's burden, that

"but for" its breach plaintiff would have been unable to earn the income for which defendant seeks a credit.*

The rule is well illustrated by *Grinnell Co. v. Voorhees*, 1 F.2d 6[illegible], 6[illegible] (3rd Cir.), *cert. denied*, 266 U.S. 629 (1924). Grinnell contracted to install fire extinguishers for Willys Corporation which became insolvent and terminated the contract prior to completion. Willys' receiver then sold its property to the Durant Motor Company, which contracted for Grinnell to complete the installation. When Grinnell sued Willys for lost profits, the District Court held that its damages should be offset by its profits on the Durant contract. The Court of Appeals reversed, holding that mitigation did not apply. "Sound reason, wise business policy, and the weight of authority," the Court held, "do not require the plaintiff to enter into other contracts, assume the risk, use his skill, and employ his capital for the benefit of the defendant whose fault caused the damage" (*supra* at 695). The Court stated:

> "It would not be just to give the defendant the benefit of a good contract and not charge him with the loss of a bad one when plaintiff had honestly used his skill, time, and capital. Consequently *on the breach of such contracts, the defendant is not entitled to the benefit of any other contract into which the plaintiff may enter within the period it would ordinarily require for the performance of the breached contract*. . . . On the breach of such contracts the claim of the plaintiff accrues at once and the law does not inquire into later events. . . ." (Emphasis added) *Id.*

The law in New York State is to the same effect. In *Weisb[illegible] v. The Art Work Shop*, 226 App. Div. 532 (1st Dept), *aff'd*, 252 N.Y. 572 (1929), where plaintiff engineers

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* Thus, since manufacturing facilities, for example, can theoretically be expanded to meet all demands, the profit made on the sale of a second article is not deducted from the damage caused by breach of a buyer of the first article. RESTATEMENT, CONTRACTS, *supra* § 336.

contracted to supervise the installation of equipment and to instruct personnel, the breaching defendants argued for mitigation of liability measured by plaintiffs' earnings on other jobs during the contract period. The Appellate Division (per Judge Proskauer) disagreed, holding:

> "*This was not a contract for exclusive employment*, where damages might be reduced by earnings of the plaintiffs under other employment. *They were professional men, making a charge for professional service and advice*, 'If the work is done according to the contract, or if, though not completed, there is no saving to the contractor by being relieved from furnishing it, the contractor is entitled to recover the contract price.' (3 Willis, Cont. §1363)" (Emphasis added) *Id.* at 534.

Thus, although the plaintiffs had not fully performed the required contractual services, recovery of the full contract price was allowed and the court held that mitigation was not applicable.*

Even more pertinent is *Carlisle* v. *Barnes*, 102 App. Div. 573, 92 N.Y.S. 917 (1st Dept. 1905). Barnes retained Carlisle, an attorney, on a 5%-of-gross contingency fee, to recover import duties exacted by the government. Thereafter, not only did Barnes fail to furnish Carlisle with the

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* To the same general effect is *Ritz* v. *Music, Inc.*, 150 A. 2d 160 (Super. Ct. Pa. 1959) where Ritz, who contracted to devote a fair and reasonable amount of time to defendant's music business and *not* engage in other employment, devoted time to a motel purchased by him and his wife. The Court decided that the purchase did not constitute a breach of his contract with defendant nor would it be considered in mitigation of damages.

> "Did the motel business interfere with the music business? If it did not, there could be no violation of any duties under the contract, and the profits from the motel activity could not be properly considered in mitigation of damages . . .
>
> "The plaintiff's services under the contract were not inconsistent with his activities as a motel operator. The evidence does not reveal that the profits from the motel business were in any way derived by reason of the time with which Ritz had agreed to give to the music business."

necessary data to present the claims in court or to the Treasury Department, but retained other counsel to prosecute the case. The court allowed Carlisle his 5% of the $89,600 actually awarded, after appeal to the Supreme Court of the United States, and reasoned:

> ". . . There is some suggestion of inequity in the plaintiff's claim because it is said he did nothing. This action is not on a *quantum meruit.* The plaintiff was not required to prove what work he actually performed. There was a special contract and a breach, and the action is for a specific amount of damage resulting from that breach . . . and the plaintiff is entitled to recover the fixed value of his contract which was the five percent agreed upon . . . [I]t is evident that the considerations which induced the government of the United States to return the sums . . . would have been influential, irrespective of the personality of the lawyer in charge of the collection of the claim . . .
>
> * * *
>
> ". . . The value of the contract would have been secured to the plaintiff but for the defendant's default, and that value is fixed by the agreement. The plaintiff is entitled to recover his five percent whether that amount is to be called strictly 'compensation' or the 'value of the contract' or 'profit'. . . ." (*Id.* at 580-581).

Thus, the rule is that mitigation is not applicable to self-employed professionals whose release from one commitment does not of itself release work-time for other engagements. Numerous engagements can be serviced without one preempting another. Thus, in *Carlisle,* the lawyer's freedom from prosecuting one particular claim was not considered as providing him with the time necessary to service another client—since a lawyer has the flexibility to service varied clients and schedule his time to meet those varied commitments. This was true for the independent contrac-

tors in the *Grinnell* case, for the engineers in the ***Weisberg*** case, and is true for Stern.

In sum, the law does not *presume* that a breach necessarily frees a plaintiff to earn compensation that he would not otherwise have been able to earn if there were no breach. Defendant has the burden to prove a "but for" connection, and unless he does so, mitigation will not apply. *See Haughey* v. *Belmont Quadrangle Drilling Corp.*, 284 N.Y. 136, 142 (1940).

B. The Facts of Record Clearly Show That Mitigation is Inapplicable

The Stern-Satra contract (Exhibits C and D) imposes no time obligation on Stern. It speaks only of a "proposed joint venture", the condition for which is the receipt of revenues by Satra from IBM, and the further condition that Stern "devote such time necessary to service the agreement" during any renewal term. Stern aptly characterized what he understood his obligation under the contract to be:

> "In addition to bringing about the agreement between the parties, I was to continue to work with IBM in explaining and offering the kind of services that Satra was capable of, and I was to work with Satra in helping identify opportunities where IBM might be useful with the Soviets." (210A)

On cross-examination, Stern amplified his duties:

> "I was to exert my best efforts to see that there would be an agreement reached between IBM, Stromberg and Satra. I was to continue in the discussions and negotiations between the parties.
>
> "After agreements between the client and Satra, since I was a partner in the venture here, *it didn't describe specific actions I was to perform, like if I were getting a salary* to do this, but here I was to share in the revenues. Therefore, *I was to exercise my initiative to assist* wherever called upon, wher-

> ever I was able, to maximize the sales and profits. In particular, I was to continue to work with Satra, in helping to understand the needs of a technology-oriented firm, of the needs of the customer, the Soviets, in the use of the products, if I were able.
>
> "And I would similarly be a communicator, the other way, help to explain why IBM had services Satra would be able to perform. Over and above this, Mr. Oztemel had made several suggestions to the effect that he wanted to introduce me to the Moscow scene to see if I could pick up some of that knowledge" (Emphasis added) (362-363A).

According to Oztemel, "there was no performance required" of Stern (438A, 771A), and IBM made it clear that the services it desired were those of Oztemel and not of Stern (661A, 772A), for Oztemel's services, not Stern's, were a condition of IBM's contract with Satra (Exhibits H, I, L, MM, E16-34, 40-46, 65-66). Hanno Mott also recognized that nothing was required of Stern once he brought Satra and IBM together. Thus, his draft of a "more formal agreement" recited (Exhibit Z, Second Recital Clause, E-53), as the *only* consideration supporting Satra's obligation to Stern, his being "active and instrumental in presenting the possibility that Satra . . . may represent . . . [IBM] and Stromberg-Carlson . . . in trade with the several trade agencies of the Soviet Union."

It was, therefore, solely up to Stern to decide what and how much to do to aid IBM's sale efforts (to the extent it wanted such aid), to increase Satra's profits and therefore Stern's earnings. Stern conceived of himself as a communicator between Satra and IBM, suggesting to Satra technological opportunities available in Russia to promote IBM sales, and suggesting to IBM services that Satra might perform (210A, 362-363A, 691A, 792-793A, 859-861A; Exhibit C, E7-8). There was no specified time frame within which Stern was to perform these communications or whatever

else he conceived might usefully increase Satra's profit potential. Stern was capable of adjusting his schedule to satisfy time conveniences. Stern was not prohibited from utilizing his talents for other clients, or from gaining income from other endeavors. His rights and opportunities in this regard were no different after, from what they were before, Satra's breach. Thus, Giffen testified that Stern "wanted to do other projects outside of Satra" which is one of the reasons he didn't want to be a Satra employee (570A). In fact, Stern's relationship with Satra was predicated on Stern's finding many clients for Satra, in the profits derived from which Stern would share.* This is simply not a case where mitigation of damages applies.

(c) Satra Failed in its Burden of Proof

The burden of proof rests on Satra to show that its breach made it possible for Stern to earn income otherwise not earnable. *See Cornell* v. *T.V. Develop. Corp.*, 17 N.Y.2d 69 (1966); *Howard* v. *Daly*, 61 N.Y. 362, 373 (1875); 13 N.Y. Jur., Contracts §32 (1960). Satra failed to prove, or even *offer* a scintilla of evidence, that its breach gave Stern additional time or opportunity to earn income he would not otherwise have earned. There is no evidence that his freedom from Satra enabled him to earn any moneys which he would not otherwise have earned.**

* Thus see Exhibit A, E-2; Exhibit B, E-4; and 792-793A; 858A. The mitigation rule does not apply to benefit a defendant by plaintiff's ability to enter upon the performance of other contracts concurrently with that which was breached, and obtaining a profit from all the contracts plaintiff may be able to secure and perform at the same time. 13 N.Y. Jur., Damages § 29 (1960).

** Thus, Corbin, *supra* § 1041 at 261-264, cites cases where there was no reduction in damages for breach of an advertising contract merely because the advertiser's space could otherwise have been filled if plaintiff had other space for such other advertisers, or for breach of contract for goods where sufficient goods were available for both parties since the plaintiff could have had the benefit of both bargains, or for breach of a contract for carriage of goods where plaintiff could have accepted additional loads.

In fact, Satra's breach not only failed to give Stern the benefit of free time, but caused him harm beyond his failure to secure the contracted consideration. The breach cut Stern off from IBM and the Russian officials with whom he had been meeting, and which maturing relationships could only have served to expand the field of his consulting business. He gained no time, but he lost a market. For this Satra has no right to mitigate—rather its breach cost Stern lost business opportunities.

Since Satra failed to prove any actual *gain* to Stern, it logically follows that it cannot have been said to have proved that the gain to him was worth 15%. Judge Lasker nevertheless found that Stern would have spent 15% of his working hours on Satra's relationship with IBM (49A).* There was no evidence adduced at trial on which such finding could possibly have been based.

Judge Lasker further found that the market "at and since the time of the breach has been such that full employment was available to [Stern]" (49A). There is no evidence in the record to support this finding. *Per contra*, this Court can take judicial notice of newspaper and magazine articles, Bureau of Labor Statistics reports and similar items concerning the national unemployment rate, the high incidence of unemployment among senior professionals and the

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* This raises a neat question. Suppose a salesman (a) whose major customers, because of the general state of the economy, become insolvent or have retrenchment programs, and (b) whose earnings, because of this, fall from $150,000 to $50,000 a year. Should one of his customers which now breaches the agreement between them, and on which he spent some time sporadically, be allowed to argue that the salesman's newly freed time—during which he finds no work—entitles it to mitigation. And if so, would the mitigation be a presumption of 1% to 100% of the salesman's time, when so *much* of it is now available. Can the breaching party secure mitigation of, say, an arbitrary 15% of his *present* earnings (*i.e.* 15% of $50,000) rather than 15% of his lost earnings (*i.e.* 15% of *minus* $100,000)?

serious problem of the "over-40" technician—all of which are clearly contradictory to Judge Lasker's pronouncement.

Apart from all other considerations, the District Court had no basis to order a 15% reduction in the sums Stern was otherwise entitled to receive under the judgment awarded him. The well-settled rule is that a party, unable to quantify the damages it suffered from a breach, may recover only "nominal" damages.* In this case, Satra had the burden to quantify the amount of the credits to which it would be arguably entitled. Satra completely failed in this burden, since it offered no proof as to the amount of income Stern earned by reason of Satra's breach. Thus, even if the mitigation principle were here valid, Satra is entitled to no more than a "peppercorn" of mitigation credit.

Mitigation was here applied without taking into account the particular facts of this case, and the circumstances of this time. This is no case for mitigation or for an arbitrary 15% rule.

Judge Lasker's rulings on mitigation are not fairly based on the record and are not affected by any questions of credibility. This Court is therefore in as good a position as the District Court to make the relevant findings. *See Dopp v. Franklin Nat'l Bank* and *Concord Fabrics, Inc. v. Marcus*

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* *See, e.g.*, 5 CORBIN, CONTRACTS §1001 (1964) ("If he makes no such proof [of his harm] . . ., the judgment in his favor will be for nominal damages only."); 11 WILLISTON, CONTRACTS §1339A (3rd ed. 1968) (Nominal damages are awarded "where the actual injury, although real and perhaps serious, cannot be measured by the rules requiring that harm caused shall be foreseeable and not speculative"); RESTATEMENT, CONTRACTS §331(1) (1932) ("Damages are recoverable for losses caused or for profits and other gain prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.")

Bros. Textile Corp., cited *supra*, page 44. We ask that the District Court's rulings on mitigation be vacated and that this Court order that there should be no offset for mitigation against the sums otherwise recoverable by Stern under his judgment.

CONCLUSION

For the reasons stated, this Court should deny Satra's appeal and affirm the judgment of the District Court on the questions presented by Satra:

1. The District Court's instructions to the jury were fair and adequate and the refusal to give the redundant charge requested by Satra did not affect any substantial right of Satra.

2. The District Court's determination as to the application of the expense schedule was not clearly erroneous.

3. The District Court's determination that the 1973 Satra-IBM contract constituted a replacement and renewal of the 1971 Satra-IBM contract was not clearly erroneous.

As to Stern's cross-appeal, the rulings of the District Court should be vacated, and this Court should order:

1. The schedule of expenses in the Stern-Satra agreement should not be applied as an offset against the monthly payments from IBM to Satra under their 1973 agreement.

2. There should be no offset by reason of mitigation against the sums recoverable by Stern against Satra.

Respectfully submitted,

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STROOCK & STROOCK & LAVAN
Attorneys for Marvin Stern
Plaintiff Appellee and
Cross Appellant
61 Broadway
New York, New York 10006
(212) 425-5200

*Of Counsel:**

ALVIN K. HELLERSTEIN
VIVIENNE W. NEARING

* Shira A. Scheindlin, an associate of the firm who awaits admission to the New York bar, assisted in the preparation of this brief.

Service of two (2) copies of

the within Brief is hereby admitted this

2nd day of March, 1976

Attorney for

Webster & Sheffield
by Albert M. Appel
Attys for Defendants - Appellants